Tennas Engineering Sdn Bhd v Sebor (Sarawak) Marketing & Services Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 11–08 OF 2003 II
LAU BEE LAN J
6 MAY 2005

Civil Procedure — Appeal — New evidence — Reasonable diligence — Burden of adducing party — Rules of the High Court 1980 O 55 r 5A & O 92 r 4

The appellant had appealed in whole the decision of the magistrate's court. This was an application by the appellant that sought to admit some documents ('the said documents') as evidence in court pursuant to O 55 r 5A and O 92 r 4 of the Rules of the High Court 1980 ('the RHC'). Basically, the grounds for the appellant's application were that the appellant had only recently located the said documents after the hearing before the magistrate's court and that the said documents would have had a determining influence upon the decision of the magistrate's court.

Held, dismissing the application:

(1) The appellant had not proffered any plausible explanation as to why they were unable to locate the said documents save for the contention that the said documents were misplaced and they had made 'immense efforts' to locate them but were prevented due to the voluminous documents involved. The appellant had not disclosed where they found the said documents save stating that 'the documents (have been) recently located' and 'it was not discovered until now' (see para 12).

(2) Although the appellant contended that they were just being honest and speaking the truth, the fact still remained that the said documents were at all material times in their possession and given the length of time available to the appellant to attempt and locate the said documents, it was highly questionable and doubtful whether the appellant had exercised reasonable diligence in securing the said documents before the hearing of the magistrate's court (see para 13).

(3) The appellant had also failed to satisfy the court that the said documents would have been likely to have a determining influence upon the decision of the magistrate's court (see para 16).

[**Bahasa Malaysia summary**

Perayu telah merayu sepenuhnya keputusan mahkamah majistret. Ini adalah permohonan oleh perayu untuk mengemukakan dokumen-dokumen ('dokumen-dokumen itu') sebagai keterangan dalam mahkamah menurut O 55 r 5A dan

O 92 r 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Alasan-alasan bagi permohonan perayu adalah bahawa perayu baru mengesan lokasi dokumen-dokumen itu selepas pembicaraan di hadapan mahkamah majistret dan dokumen-dokumen itu akan mempunyai pengaruh penentu ke atas keputusan mahkamah majistret.

Diputuskan, menolak permohonan itu:

(1) Perayu tidak dapat menjelaskan dengan munasabah mengapa mereka tidak dapat mengesan lokasi dokumen-dokumen itu kecuali dengan memberi sebab bahawa dokumen-dokumen itu telah disalah letak dan 'immense efforts' telah diambil untuk mencari dokumen-dokumen itu tetapi dihalang kerana jumlah besar dokumen-dokumen itu. Perayu tidak mendedahkan di mana dokumen-dokumen itu dijumpai kecuali mengatakan 'the documents (have been) recently located' dan 'it was not discovered until now' (lihat perenggan 12).

(2) Walaupun perayu menyatakan bahawa mereka hanya berkelakuan jujur dan bercakap benar, fakta adalah bahawa dokumen-dokumen itu adalah pada semua masa matan dalam milikan mereka dan berdasarkan tempoh masa yang diberi kepada mereka untuk cuba dan mengesan lokasi dokumen-dokumen itu, ia boleh dipersoalkan sama ada perayu telah mengambil langkah-langkah yang wajar untuk mendapatkan dokumen-dokumen itu sebelum pembicaraan di mahkamah majistret (lihat perenggan 13).

(3) Perayu juga gagal untuk memuaskan mahkamah bahawa dokumen-dokumen itu mempunyai pengaruh penentu ke atas keputusan mahkamah majistret (lihat perenggan 16).]

Notes

For a case on appeal based on new evidence, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1082.

Cases referred to

Bajaj Textiles Ltd v Gian Singh & Co Ltd [1971] 2 MLJ 133 (refd)
Clayton's Case [1814-23] All ER Rep 1 (refd)
Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors [1996] 2 MLJ 666 (refd)
Ladd v Marshall [1954] 3 All ER 745 (refd)
Lam Soon Cannery Co v Hooper & Co [1965] 2 MLJ 148 (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (refd)
Lim Hee Chuan v Toh Phaik Har [1949] MLJ 92 (refd)
Norfaiz Azli bin Muhammad v Abdullah bin Yaman [2001] MLJU 441 (refd)
Sanders v Sanders (1881) 19 Ch D 373 (refd)
Shedden v Patrick [1869] LR 1 Sc 470 (refd)
Tetuan Tanjung Teras v Tetuan Syn Tai Hung Trading [2003] 4 MLJ 465 (refd)
UOL Factoring Sdn Bhd v Chey Ching Soon & Anor [2000] 1 CLJ 727 (refd)

Legislation referred to

Companies Act 1965 Form 44
Rules of the High Court 1980 O 55 r 5A, O 92 r 4

Appeal from: Summons No 72–2524 of 1998 (E) (Magistrates' Court, Kuching)

Allan Lo (David Allan Sagah & Teng Advocates) for the appellant.
Yen-Tze Ee (Ee & Lim) for the respondent.

Lau Bee Lan J:

[1] Vide a notice of appeal dated 28 February 2003, the defendant/appellant (hereinafter referred to as 'the appellant') has appealed against the whole decision of the learned magistrate given on 17 February 2003 (encl 4). In the interim, the appellant filed in a summons in chambers dated 19 March 2004 (encl 12) seeking that three documents: (a) payment voucher No 2 dated 4January 1996 of Tennas Trading Co; (b) payment voucher No 4 dated 14June 1996 of Tennas Trading Co; and (c) letter dated 6 May 1996 of Sebotronics (ref: DS Y34/96/196) (hereinafter referred to as 'the said documents') be admitted as evidence in court pursuant to O 55 r 5A and O92 r 4 of the Rules of the High Court 1980 ('the RHC') (hereinafter referred to as 'the appellant's application'). Basically, the main grounds for the appellant's application are that the appellant has only recently located the said documents after the hearing before the magistrate's court and that these documents would have had a determining influence upon the decision of the magistrate's court.

[2] The court has considered the written submissions of both the learned counsel for the appellant and plaintiff/respondent (hereinafter referred to as 'the respondent'), Mr Allan Lao and Mr Yen-Tze Ee respectively and the four affidavits of John Then Yu Bin filed in support of the appellant's application and the four Affidavits of Chan Poh Hui filed in opposition thereto including the various authorities cited therein. The court's findings and evaluation are the following.

[3] It appears that both Mr Lao and Mr Ee are in agreement as to the law applicable in respect of the appellant's application. O 55 r 5A of the RHC provides:

> At the hearing of an appeal, fresh evidence shall not be admitted unless the judge is satisfied that:
>
> (a) at the hearing before the subordinate court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available (hereinafter referred to as 'the first condition'); and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the subordinate court (hereinafter referred to as 'the second condition').

[4] Both Mr Lao and Mr Ee had referred the court to the case of *Norfaiz Azli bin Muhammad v Abdullah bin Yaman* [2001] MLJU 441 and in addition, Mr Ee had referred to *Tetuan Tanjung Teras v Tetuan Syn Tai Hung Trading* [2003] 4 MLJ 465. From both the cases and the other authorities to be referred to hereinafter, it can be gleaned that O 55 r 5A of the RHC incorporates the principles enunciated in *Ladd v Marshall* [1954] 3 All ER 745 where in an application to the Court for a new trial on the ground that the witness had told a lie, Denning LJ at p 748 opined:

> To justify the receipt of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[5] In relation to the prerequisite of the first condition, according to the appellant, the said documents were not available at the hearing before the magistrate's court because the appellant has misplaced them in the course of shifting their office from Lot 493 10 Section 64, Lorong 11A, Jalan Ang Cheng Ho, 93100 Kuching (hereinafter referred to as 'the old address') to Lot 793 Section 64, Jalan Sekama, 93300 Kuching (hereinafter referred to as 'the new address'). the appellant further averred that the accounts department and staff had made great efforts to retrieve the said documents but were hampered by the sheer volume of old records and documents belonging to the appellant's seven companies ie the defendant company (Tennas Engineering Sdrt Bhd), Tennas Komunikasi Sdn Bhd, Tennas M & E Engineering Sdn Bhd, Instacom Sdn Bhd, Commzed Sdn Bhd, Tennas Trading and Tennas Enterprise 'which were all housed under one roof at the new office premises'. the appellant further averred that there was no reason for the appellant to hide the said documents if they were available in the earlier proceedings as John Then Yu Bin had affirmed an affidavit on 3 December 2001 (exh J1) that he had a recollection of the said documents but as at the date of the said affidavit the said documents could not be located by the appellant's accounts department and he reserved the right to file another affidavit to adduce the said documents when they have been found. the appellant, however admitted that they have only managed to locate the said documents after the present appeal had been filed (on 26 February 2003). In support of the appellant's application, Mr Lao cited the cases of *Norfaiz Azli bin Muhammad* and *UOL Factoring Sdn Bhd v Chey Ching Soon & Anor* [2000] 1 CLJ 727 and submitted that the appellant has fulfilled the first condition of O 55 r 5A of the RHC.

[6] On the other hand, the respondent contended that the appellant has failed to fulfill the first condition thereof because the appellant has not produced any evidence nor disputed in any of its affidavits that the said

documents which they now seek to admit were always in their possession and control before the hearing of the appellant's application ie notice of application dated 27 October 2001 for a determination of an issue of law without a full trial of whether the respondent's claim is statute-barred pursuant to s 3 Limitation Ordinance (Chapter 49) in respect of the respondents's invoice No 215475, 213933, 215137, 217651, 217822, 217950 and 218271 as well as the respondent's debit notes No 195 and 29558 (hereinafter referred to as 'the magistrate's court's application'). In support of their contention, Mr Ee cited the cases of *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 where in respect of an application by the appellant to adduce fresh evidence in calling a new witness, Mr Callow, the chief architect of the Ministry of Education, during the hearing of an appeal, the Federal Court dismissed the application stating:

> I do not think that the appellant has satisfied the first condition. *He knew that Mr Callow was at the material times chief architect at the Ministry of Education, that he had direct knowledge as to what drawings he (the appellant) was required*: (a) to trace; (b) to modify where necessary, and (c) to prepare new designs from Government drawings and the reasons which made the drawings necessary, *and that Mr Callow's evidence would therefore be important to the appellant's case. The appellant was not an ignorant and unrepresented rustic but the head of an important engineering firm represented by an eminent firm of solicitors. He contrived to trace Mr Callow's address after judgment and I am of the opinion that it cannot be said that it could not have been obtained before the trial had he used reasonable diligence.* (Emphasis added.)

[7] Mr Ee also referred to the case of *Lim Hee Chuan v Toh Phaik Har* [1949] MLJ 92 where on appeal against the decision of the magistrate ordering that 10 maintenance be paid by the appellant/husband, an application was made by him to call further evidence to show, *inter alia*, that he was a Christian at the time of the alleged marriage and therefore the marriage was not valid. Indismissing the application, the court at p 93 left hand column held that the main principle to be considered is that pronounced by Lord Chelmsford in *Shedden v Patrick* [1869] LR 1 Sc 470:

> It is an invariable rule in all the courts ... *that if evidence which either was in the possession of parties at the time of a trial or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.* (Emphasis added.)

[8] Further, the court at p 93 right hand column also considered the moral aspect of the case to adduce fresh evidence by referring to a passage from the judgment of Jessel MR in the case of *Sanders v Sanders* (1881) 19 Ch D 373:

> As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in court. The exact point on which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury. Moreover

speaking for myself, I think that when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds,than in favour of an attempt to defeat a good case on technical grounds.

[9] Mr Ee further cited the cases of *Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors* [1996] 2 MLJ 666 and *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148. In the former case, the appellant, the second and the third respondents were directors and shareholders of a construction company (Juta Vila (M) Sdn Bhd) applied to the court to admit fresh evidence. Differences arose between them and the appellant filed a petition to the court seeking, *inter alia*, for an order that the second and third respondents purchase his shares at RM2.82 million and an interim receiver be appointed to prevent mismanagement of the company's asset or alternatively for a winding-up order. The appellant's application was rejected by the Judicial Commissioner and the appellant appealed and before the hearing of the appeal proper, applied to the court to admit fresh evidence to support his contention that the Judicial Commissioner has made a wrong contention. The Court of Appeal held that the appellant did not satisfy the first condition in *Ladd v Marshall* because the fresh evidence sought to admit was in possession of the appellant before the petition was filed but only discovered by his solicitors subsequent to the hearing before the Judicial Commissioner.

[10] In the latter case of *Lam Soon Cannery Co*, on the hearing of an appeal, there was an application to adduce further evidence which consisted of a number of letters which has passed between the parties and/or the agents which were in possession of the applicants or the agents but it was alleged it was embodied in a very large mass of correspondence and their existence could not have been discovered even with the exercise of all proper care and diligence. It was not disputed that the second and third conditions in the case of *Ladd v Marshall* were satisfied. The applicants sought to bring their case within the first condition, ie whether the evidence could have been obtained with reasonable diligence for use at the trial but which was dismissed. In this connection the Federal Court considered the same passage from the judgment of Lord Chelmsford in the case of *Shedden v Patrick* as quoted hereinbefore.

[11] Based on the averments contained in the affidavits of John Then Yu Bin, I agree with the respondent that it is undeniable that the said documents which the appellant seek to admit as fresh evidence were throughout in their possession and within their control as they did not dispute this fact. How is the court to gauge whether the respondent has exercised reasonable diligence and indeed that the said documents were not available at the time of trial to be used by them as evidence? I believe it is by delving into the conduct of the appellant at the inception of the magistrate's court's application.

[12] Based on the chronology of events, the appellant raised the defence of the limitation in the statement of defence dated 7 May 1999 and the respondent disputed the issue of limitation vide its reply dated 20 May 1999. On18 November 1999 pursuant to an order of the magistrate's court, the appellant was ordered to serve the respondent a list of documents and an affidavit verifying such list. On 12 December 2001, the date on which the appellant was served with an affidavit by the respondent asserting that the two payments allegedly made under the payment vouchers dated 4 January 1996 and 14 June 1996 were made generally on the account so as to extend the limitation period, it is apparent that the appellant and/or its solicitors had about a year to locate the said documents before the hearing of the magistrate's court's application which was on 19 December 2002. Further, the search made by the respondent in Form 44 under the Companies Act 1965 (exh C3 in the affidavit in reply of Chan Poh Hui affirmed on 15 April 2004 (encl 16)) showed that the appellant had shifted from the old address to the new address on 15 July 1998. From this date until 19 December 2002, the appellant had ample time ie, about four years to locate for the said documents. I agree with Mr Ee that the appellant has not proffered any plausible explanation as to why they were unable to locate the said documents save for the contention that the said documents were misplaced and they had made 'immense efforts' to locate them but were prevented due to the voluminous documents involved. It is also true that the appellant has not disclosed where they found the said documents save stating that 'the three documents (have been) recently located' and 'it was not discovered until now'.

[13] In examining the appellant's list of documents (sch I to exh A of exh C7 in the affidavit of Chan Poh Hui affirmed on 15 April 2004 (encl 16)), it is noteworthy to observe as pointed out by Mr Ee that there was listed therein an extensive number of documents ranging from as early as July 1993 until mid 1998. It is indeed strange why the two payment vouchers dated 4 January 1996 and 14 June 1996 were not available then. Although the appellant contended that they are just being honest and speaking the truth by reference to an exh J1, the fact still remains ie, the said documents were at all material times in their possession and given the length of time available to the appellant to attempt and locate the said documents, have they therefore, in truth and in fact exercised reasonable diligence to locate them? Therefore I am of the view that it is highly questionable and doubtful whether the appellant has exercised reasonable diligence in securing the said documents before the hearing of the magistrate's court application.

[14] I also agree with Mr Ee's submission that the appellant has knowledge of the need for the said documents at all material times since they have the benefit of legal counsel from the commencement of the action and as aptly pointed out by him that it was not a case where the appellant was 'an ignorant and unrepresented rustic'.

[15] In the light of the line of authorities which I have alluded to above, I therefore, find that the appellant has failed to satisfy the first condition under O 55 r 5A of the RHC 15 and because the first and second conditions of O 55 r 5A of the RHC are cumulative and not in the alternative, I have no alternative but to dismiss the appellant's Application with costs to the respondent (see *Lam Soon Cannery Co* and *Lau Foo Sun*).

[16] However for the sake of completeness, in the event I am wrong in my finding with respect to the first condition, I now turn to the determination of whether the appellant has fulfilled the second condition of whether the fresh evidence in the nature of the said documents would have or would not have been likely to have had a determining influence upon the decision of the magistrate's court.

[17] In the magistrate's court's application, the respondent alleged that their claim was statute barred and relied on three payments purportedly made by the appellant:

(a) payment on 27 March 1998 for RM17,467.03 (Payment No 1) with official receipt No 435429 (OR3);

(b) payment on 19 June 1996 for RM19,240.68 (Payment No 2) with official receipt No 353369 (OR2), and

(c) payment on 9 January 1996 for RM 13,306.50 (Payment No 3) with official receipt No 335899(OR3).

[18] The respondent submitted that the three aforementioned payments have the effect of renewing the limitation period and were made generally to the appellant's accounts maintained by the respondent dated 29 March 1998, 30 April 1998, 31 May 1998 and 31 July 1998 respectively); exhs C4, C7, C8 and C9 (annexed to Chan Poh Hui's affidavit in reply affirmed on 15 April 2004 (encl 16)). Therefore, the appellant contended that the respondent's reference to the statement of accounts dated 29 March 1998 in their written submission at para 18 (encl 33) is flawed.

[19] On the other hand, it is the contention of the appellant that the said documents show that the two payment vouchers dated 4 January 1996 and 14June 1996 were made by Tennas Trading Co to the respondent for specific purposes ie that the payment vouchers were intended for payment of specific invoices of the respondent.

[20] The appellant argued that exh J2 (annexed to John Then Yu Bin's affidavit in support affirmed on 19 March 2004 (encl 12)), the payment voucher No 2 of Tennas Trading Co for payment received by the respondent on 4 January 1996 vide HHB Cheque No 509921 for RM13,306.50 and that this payment is intended for the two invoices of the respondent ie, invoices No 213932 and 213934. When cross-referred to the official receipt of the said payment, exh C3 (annexed to Chan Poh Hui's affidavit in reply affirmed on

15 April 2004 (encl 16)), the respondent submitted that it showed that payment of RM13,306.50 was received on 9 January 1996 vide HHB cheque No 509921 and the two invoices No 213932 and 213934 appeared on the left hand column.

[21] The appellant therefore contended that the said documents which they seek to adduce as fresh evidence 'is conclusive evidence that the payments were intended for specific purposes and hence are highly relevant and will most definitely have a determining influence upon the decision of the magistrate's court'. In support Mr Lao cited *Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1971] 2 MLJ 133 a Privy Council case regarding the operation of a running account and payments were made in respect of the outstanding balance and in the context of the defence of limitation, time starts to ran afresh on the occasion of each payment.

[22] As to how to determine that payments have been made on account of the outstanding balance, Mr Lao referred to *Clayton's Case* [1814-23] All ER Rep 1 where it was held that:

> In the case of a current account between the debtor and creditor there is, in the absence of an agreement to the contrary,a presumption that the first item on the credit side of the account is intended to be applied in payment of the first item on the debit side of the account.

[23] In rebuttal, the respondent submitted that the appellant has not adduced any evidence to show that the payment vouchers dated 4 January 1996 and 14June 1996 had been delivered or received by the respondent as there is no mark endorsed on it and hence there is no credible proof that the appellant had communicated to the respondent its wish to appropriate the payments made under the payment vouchers to specific debts or that the respondent had been duly informed of such a wish. The respondent further argued that without such communication or knowledge on the part of the respondent, the respondent could not have been in any position to accept or effect the alleged appropriation. It was further submitted that, likewise, the magistrates court would not have been in a position to hold that the payments made under the payment vouchers were for specific debts as there would not have been any plausible evidence to suggest that the payments were other than general payments made on the running account of the appellant with the respondent.

[24] With respect to payment voucher dated 4 January 1996, *prima facie*, looking at exh J2 and exh C3 with the particulars alluded to therein, it may be argued that the payment was not made by the appellant but by another legal entity, Tennas Trading Co. Be that as it may, as correctly submitted by Mr Ee, there is no credible evidence to prove that the payment voucher dated 4January 1996 was meant for a specific purpose as contended by the appellant because there is no credible evidence to prove such specific instructions for appropriation to be made by the respondent in respect of such payment.

[25] As for payment voucher dated 14 June 1996, amounting to RM19,240.68 (exh J3) although the appellant averred that it is for a specific purpose and not made generally into the account of the respondent, I find that the appellant has not cross-referred to any official receipt and if indeed the official receipt number is 353369 as they alleged, why is it not produced? the appellant also made reference to exh J4, a copy of the letter dated 6 May 1996 from the respondent addressed to the appellant. In my view, this letter is of no evidential value because the appellant has not explained how it is related to the second payment referred to in line 5–6 at p 11. Further, it negates Mr Lao's submission when he stated in para 14 of encl 33 that the two payments referred to in the said documents were not made by the appellant but by Tennas Trading Co another legal entity and therefore they were intended for settlement of specific invoices and not generally to the account of the appellant kept and maintained by the respondent. I am doubtful of the appellant's contention because although the payment voucher dated 14 June 1996 is from Tennas Trading Co and the words 'being 30% upon confirmation order as per Ref: DS731/96/196 (for residence Inn: PABX System) Inv 245788' for the amount of RM19,240.68 (exh J3) and these words appear at various parts of the letter dated 6 May 1996 (exh J4), however, it is significant to note that this letter which the appellant seek to rely on in support of payment for a specific invoice is addressed to Tennas Engineering Sdn Bhd and not Tennas Trading Company. Again, there is a handwriting notation of ('TTC') which presumably may refer to Tennas Trading Company but why is such a notation there and whose handwriting is it.

[26] I also find the two cases of *Bajaj Textiles Ltd* and *Clayton's Case* are not relevant at this juncture because as conceded by Mr Lao, the court is now only concerned with whether the appellant has discharged its burden with regard to the second condition under O 55 r 5A of the RHC and not whether the payments would have the effect of reviving the limitation period nor with whether the payments were made generally to the account or otherwise. It is my finding that in the absence of cogent evidence, the appellant has failed miserably to satisfy the court whether ie, the said documents would have been likely, what more to say, would have had a determining influence upon the decision of the magistrate's court.

[27] Hence, even if I were to err in my finding with regard to the first condition, the appellant's application would still have to be dismissed with costs to the respondent on the ground that the second condition has not been satisfied by the appellant since it is imperative for the first and second conditions of O 55 r 5A of the RHC to be read together.

Application dismissed.

Reported by Peter Ling